

No. 44051-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY A. HOCKLEY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-05153-8
The Honorable Kathryn Nelson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt all of the elements of attempting to elude a pursuing police vehicle.
2. The State failed to prove that Timothy Hockley drove his vehicle in a reckless manner while attempting to elude a pursuing police vehicle.
3. The court granted the State's motion to dismiss count two, driving with a suspended or revoked license, but failed to indicate such dismissal in a written order or on the judgment and sentence.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence showed that Timothy Hockley was speeding and failed to completely stop at several intersections, but also that Hockley significantly slowed down before entering the intersections and there was little or no vehicle or pedestrian traffic, did the State fail to prove that Timothy Hockley drove his vehicle in a reckless and indifferent manner? (Assignments of Error 1 & 2)
3. Should the judgment and sentence be corrected to reflect the trial court's dismissal of count two? (Assignment of Error

3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Timothy Andrew Hockley by Information with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024), and one count of driving with a suspended or revoked license (DWLS) (RCW 46.20.342). (CP 1-2) The state also alleged that the eluding charge was aggravated because Hockley endangered more than one person (other than himself or the pursuing police officer) during the commission of the offense (RCW 9.94A.834, 9.94A.533(11)). (CP 1)

On the State's motion, the trial court dismissed the DWLS count before trial. (RP 27-28) The jury found Hockley guilty of eluding and of the special aggravator. (RP 186; CP 45-46) The trial court sentenced Hockley to a standard range sentence of 14 months plus one day. (RP 202; CP 57, 60) This appeal timely follows. (CP 70)

B. SUBSTANTIVE FACTS

Pierce County Sheriff Deputy Matthew Smith was on patrol in the evening of December 24, 2011. (RP 71, 73, 76) He was driving in his patrol vehicle, which was equipped with overhead

colored emergency lights, white “wig-wag” lights, a siren, and large Sheriff’s Department decals on both sides of the vehicle and on the trunk. (RP 75) As Deputy Smith drove westbound on 85th Street East, he noticed a Honda Accord and a second light green car driving eastbound on 85th Street East. The green car was driving very close behind the Honda, almost touching its back bumper. (RP 76, 78)

The green car pulled into the westbound lane, nearly colliding with Deputy Smith’s vehicle, then sped past the Honda and continued east on 85th Street. (RP 77, 78) Deputy Smith turned his vehicle around to follow the green car. (RP 79) The green car turned the corner and accelerated away. (RP 79-80)

Deputy Smith testified that the speed limit on the mostly residential streets in the neighborhood was 25 or 35 miles per hour, but the green car reached speeds of 50 to 60 miles per hour. (RP 80) Deputy Smith decided to attempt a traffic stop, so he activated his colored emergency lights and continued to pursue the green car. (RP 80) But the green car continued driving, even though there were several places where the car could have safely pulled to the side of the road. (RP 81)

Deputy Smith testified that the green car came to an

intersection, slowed down, then turned east onto 91st Street. (RP 82) Deputy Smith, who was now close enough to read the green car's license plate, activated his sirens. (RP 83) The green car still did not stop. (RP 83) The driver of the green car again slowed to about 15 miles per hour as he approached another intersection, activated the car's turn signal, then turned without first coming to a complete stop, despite the stop sign posted at the intersection. (RP 83, 84, 97) The driver then accelerated back to approximately 60 miles per hour, passed another vehicle, then turned again onto 21st Avenue. (RP 84, 85) The driver then pulled to a stop in front of a house on 21st Avenue. (RP 85)

Deputy Smith drew his weapon and ordered the driver, Timothy Hockley, out of the green car. Hockley was cooperative, and apologized for not stopping sooner. (RP 93, 94, 100) Hockley explained that the Honda Accord had been "break checking" him, and he was concerned for his safety, so he attempted to pass the Honda. (RP 94) When he nearly collided with Deputy Smith, he panicked. (RP 94) He did not want to stop before reaching the house on 21st Street, where his girlfriend lived, because he did not want the car to be towed. (RP 94)

Deputy Smith also testified that the roads were clear and dry

that evening, and there was little or no vehicle or pedestrian traffic. (RP 96, 97) When Deputy Smith approached the green car after Hockley stopped, he saw that there was a passenger inside. (RP 93) The passenger, Charlene Massey, is Hockley's girlfriend and the house where Hockley stopped belongs to her mother. (RP 98) Massey was, according to Deputy Smith, hysterical and crying when he approached the car. (RP 93)

Massey testified that she and Hockley were on their way to her mother's house on Christmas Eve. (RP 117) The Honda Accord in front of them was driving erratically, and they were concerned that it might cause an accident. (RP 120) So Hockley decided to pass the Honda. (RP 120) When they saw the Deputy's vehicle, they assumed it was going to try to stop the Honda. (RP 120)

When they realized the Deputy was signaling Hockley to stop, they did not pull over immediately because the neighborhood is not safe, and because they were concerned for the safety of her dog and the large number of Christmas presents in the back seat of the car. (RP 118-19, 123, 124) Hockley and Massey wanted to get to Massey's mother's house nearby, so that the dog and gifts could be safely unloaded into the house. (RP 123, 24)

Massey testified that she was never concerned for her safety during the drive, and she was never in danger. (RP 127) Deputy Smith approached her with his gun drawn, and that is why she was upset and crying. (RP 122-23)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE THAT TIMOTHY HOCKLEY DROVE HIS VEHICLE IN A RECKLESS MANNER WHILE ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

A driver of a motor vehicle is guilty of attempting to elude a pursuing police vehicle if he or she:

willfully fails or refuses to immediately bring his or her vehicle to a stop and . . . drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop[.]

RCW 46.61.024(1). However, “[n]o crime is committed if a defendant merely fails to immediately stop his vehicle.” State v. Mather, 28 Wn. App. 700, 703, 626 P.2d 44 (1981). He must also drive his vehicle in a “reckless manner,” which means “a rash or heedless manner, with indifference to the consequences.” State v. Naillieux, 158 Wn. App. 630, 644, 241 P.3d 1280 (2010) (internal quotations omitted).

For example, in State v. Perez, 166 Wn. App. 55, 269 P.3d 372 (2012), the court found sufficient evidence to support a conviction for attempting to elude a pursuing police vehicle where: the officer attempted to stop the defendant on suspicion of driving with a suspended license; the officer turned his patrol car around, activated his emergency lights, and followed the defendant; the defendant then immediately doubled his speed and frightened a pedestrian, scared a dog, and then ran a stop sign; the officer activated his siren briefly; the defendant threw open his car door, left the door open, and ran away; and the jury watched the entire 40-second pursuit on video from the squad car’s dash camera.

In State v. Treat, 109 Wn. App. 419, 35 P.3d 1192 (2001), the court found sufficient evidence to convict the defendant of attempting to elude a pursuing police vehicle where: uniformed deputies signaled the defendant to stop by using their overhead lights and sirens; and the defendant sped down the road for approximately one-quarter mile before stopping briefly, accelerating at a deputy, and then attempting to once again drive away, even after deputies shot out two of his tires.

And in State v. Refuerzo, 102 Wn. App. 341, 7 P.3d 847 (2000), the court found sufficient evidence that the defendant drove his vehicle in a manner indicating wanton or willful disregard for the lives or property of others where: the defendant weaved through downtown traffic during a busy time; he disregarded several stop signs and lights, cut across four lanes of traffic while turning and went through a series of crosswalks in the presence of heavy pedestrian traffic; and the officer testified that he observed damage to a parked car and defendant's car consistent with a minor collision.

In this case, the evidence did not prove that Hockley was indifferent to the consequences of his driving. Hockley was speeding, and failed to come to a complete stop at several stop

signs. But Deputy Smith testified that he slowed down significantly at the intersections as if he was trying to safely clear the intersection, and that he used his turn signal at least once. (RP 82, 84, 97) Deputy Smith also testified that they passed only one occupied vehicle during the one to two mile pursuit. (RP 96, 97, 103-04) Unlike the defendants in Perez and Refuerzo, Hockley did not drive recklessly in heavy traffic or in the presence of pedestrians, did not collide with any other vehicles, and did not accelerate towards an officer or other individual.

Furthermore, the evidence did not prove that Hockley was trying to elude, or get away from Deputy Smith. Rather, it shows that Hockley was simply trying to get to Massey's mother's house, where he felt the green car and its contents would be safe, before he stopped. (RP 94, 118-19, 123-24) Once there, he was fully cooperative and, unlike the defendant in Perez, did not try to flee on foot. (RP 86, 87, 94, 100)

The evidence showed that Hockley failed to stop when directed to by Deputy Smith, but did not show that his failure constituted a felony attempt to elude. Accordingly, Hockley's conviction should be reversed and dismissed with prejudice.

B. THE TRIAL COURT DISMISSED COUNT TWO BUT FAILED TO SET FORTH ITS RULING IN A WRITTEN ORDER OR IN THE JUDGMENT AND SENTENCE

Before trial, the court orally dismissed the driving with a suspended or revoked license as charge alleged in count two. (RP 27-28) But the court did not enter an order dismissing count two at that time. And the judgment and sentence, which contains a blank space for the court to list dismissed charges, does not mention the charge. (CP 58)

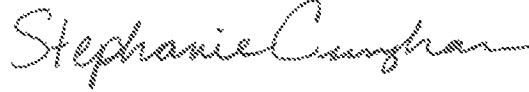
This Court should remand for amendment of the judgment and sentence to reflect the court's dismissal of count two or, in the alternative, enter an order dismissing count two. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

V. CONCLUSION

The State failed to prove that Hockley drove his vehicle in a reckless manner, with indifference to the consequences of his driving. Therefore, his attempting to elude conviction must be reversed. Additionally, Hockley's case should be remanded to

allow the trial court to memorialize in writing its dismissal of count two.

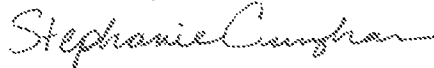
DATED: March 4, 2013



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CERTIFICATE OF MAILING

I certify that on 03/04/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Timothy A. Hockley, DOC# 833392, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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